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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WENDY CHOWNING, individually and on behalf of all others similarly situated,

Plaintiff,

v.

KOHL'S DEPARTMENT STORES, INC., a Delaware Corporation; KOHL'S CORPORATION; and DOES 1 through 20, inclusive,

Defendants.

CASE NO. 2:15-cv-8673-RGK-SP

PLAINTIFF'S RESPONSE TO DEFENDANT'S LATE SUBMISSION OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

CLASS ACTION

Date: March 14, 2016
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner
Crtm: 850

Pursuant to L.R. 56-2, Plaintiff Wendy Chowning ("Chowning") hereby responds to Defendants Kohl's Department Stores, Inc. and Kohl's Corporation (collectively, "Kohl's" or "Defendants") late filed Statement of Uncontroverted Facts and Conclusions of Law in opposition to Defendants' Motion for Summary Judgment [Dkt. No. 74].

I. INTRODUCTION

Defendants' Motion for Summary Judgment was filed on January 25, 2016 [Dkt. No. 48] but did not include a Statement of Uncontroverted Facts and Conclusions of Law as required by Local Rule 56-1. Plaintiff filed her opposition on February 16, 2016 [Dkt. No. 59]. In support of her opposition, Plaintiff filed a Statement of Genuine Disputes ("SGD"). [Dkt. No. 59-3]. Only after Plaintiff filed her brief did Defendants then file a (late) Statement of Uncontroverted Facts and Conclusions of Law on February 22, 2016. [Dkt. No. 74]. Plaintiff therefore responds as follows:

Statement of Fact	Plaintiff's Response	Admissible Evidence
1. Plaintiff testified "I don't know" when asked "[i]f the robe was advertised without any regular price at all, all it said was 26.99, would you have bought the robe?" and "If there was no regular price listed, just the $21, and you thought that $21 was a good value for the	Disputed. Plaintiff bought the robe *because* she saw it on sale for $26.99.	SGD No. 28; Chowning Deposition at 34:18-35:8; 51:4-7, 54:1-55:7, 56:4-20, 58:11-59:1, 59-10-14. SGD 29: Chowning Depo at 54:1-16.
	If Plaintiff knew that the true Regular price was	SGD 31: Chowning Depo at 54:1-56:20 &

dress, would you have bought it?" She later submitted an errata form that changed her answer.	$26.99 rather than the advertised $46.00, she would not have bought the Robe because she "would think that I was paying too much money for it."	Errata Sheet lines 18-24.
	Plaintiff "spent money on [the robe]" that she would not otherwise have spent because she would have waited for it to go on sale.	SGD 31: Chowning Depo at 54:1-56:20 & Errata Sheet, lines 18-24.
	Defendant's question lacked foundation and was vague because it presumed that Plaintiff thought that $21 was a "good value", and immediately followed a discussion of "value," yet Plaintiff had no basis to know the value of the Robe, and if she knew that the true value was the amount that she paid, she would not have bought the Robe and she "spent money on it" that she	SGD 31: Chowning Depo at 54:1-56:20 & Errata Sheet, lines 18-24.

	would not otherwise have spent because she would have waited for it to go on sale	
	Plaintiff bought the Dress *because* it was on sale and she thought she "was getting a good value."	SGD 35: Chowning Depo at 16:22-17:9; 32:8-33:7, 47:16-23, 73:1-11, 78:8-12.
	Plaintiff bought the dress *because* she saw it on sale at $21 from a regular price of $70 and thought "Wow this is a great deal."	SGD 36: Chowning Depo at 16:22-17:9, 32:8-33:7, 61:3-8.
	Plaintiff now feels cheated because the $70 price tag was inflated and not the normal, everyday price for the dress.	SGD 38: Chowning Depo at 70:19-71:6.
	Defendant's deposition hypothetical lacked foundation and was vague and ambiguous because it presumed a "value," but	

	failed to specify how that value was determined in the hypothetical.	
2. Kohl's has a liberal return policy and the process of obtaining refunds is, according to plaintiff, "not hard."	Disputed. Plaintiff had previously experienced a problem with trying to return an item as Kohl's initially refused to refund her full purchase price. Plaintiff lacks a basis to confirm or dispute whether the process would be different or successful for all of the other items she purchased from Kohl's.	SGD 42: Chowning Depo at 74:6-75:9.
3. Plaintiff received at least some value form the products she purchased.	Undisputed, but irrelevant.	

DEFENDANT'S CONCLUSIONS OF LAW NO. 1

To have standing under the Unfair Competition Law ("UCL") and the False Advertising Law ("FAL"), plaintiff must show that she would not have bought the products absent the misrepresentation.

PLAINTIFF'S RESPONSE TO CONCLUSION OF LAW NO. 1

Defendant's statement is incorrect. By way of context, Plaintiff purchased a myriad of products at Kohl's and she brought to her deposition receipts and the actual products themselves. Defendants chose not to question her at all on products other than the Dress and the Robe and instead limits its standing argument to just the two products. Defendant's Conclusion of Law No. 1 incorrectly suggests that standing can be defeated by looking at only two of her many transactions.

Standing is based on reasonable reliance and causation. In the context of purchasing consumer goods, the correct standard is actually an alternative test. First, standing exists where "without such misrepresentation or nondisclosure, he or she would not, in all reasonable probability, have entered into the contract or [transaction]." *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1239, 1247 (1995).

Second, (Defendant's Conclusion of Law completely ignores this prong), standing also exits where a consumer pays more than they otherwise would have paid but for the misrepresentations by Defendant. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323, 329 (2011) (standing occurs where "a plaintiff may surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have;" "For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately"); *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 788-789 (2010) (standing occurs where plaintiffs alleged they paid more than they otherwise would have because of an alleged price-fixing cartel); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104-05 (a consumer suffers a loss whenever they spend more money than they otherwise would have spent as a result of deceptive advertising); *Degelmann v. Advanced med. Optics, Inc.*659 F.3d 835, 840 (9th Cir. 2011) (holding that standing exists where "had the product been labeled accurately, they would not have been willing to pay as much for it as they did").

DEFENDANT'S CONCLUSION OF LAW NO. 2

Damages that could have been avoided with reasonable effort are not recoverable.

PLAINTIFF'S RESPONSE TO CONCLUSION NO. 2

In a consumer fraud/misrepresentation context, restitution is not valued on what takes place *after* the purchase. Rather, restitution is based on the amount that the Plaintiff would have paid at the time of the purchase had they known the truth and in the absence of the misrepresentation. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) ("UCL and FAL restitution is based on what a purchaser would have paid at the time of purchase had the purchaser received all the information."); *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 334 (2011) ("in the eyes of the law, a buyer forced to pay more than he or she would have is harmed at the moment of purchase.").

DEFENDANT'S CONCLUSION OF LAW NO. 3

Restitution under the UCL and FAL must take value into account and is unavailable without a showing of loss.

PLAINTIFF'S RESPONSE TO CONCLUSION NO. 3

Defendant incorrectly defines and limits the word "loss" in its conclusion of law. "There are innumerable ways that a consumer can show economic injury from unfair competition," including by surrendering more or acquiring less in a transaction than he or she otherwise would have. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323 (2011); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104-05 (a consumer suffers a loss whenever they spend more money than they otherwise would have spent as a result of deceptive advertising). Restitution based on a full refund, particularly with the return of the product purchased as a result of the misrepresentation, is an available remedy that does not require an analysis of value. *People v. Superior Ct. ("Jayhill")*, 9 Cal.3d 283, 286 (1973) (authorizing a court to issue an order that victims of false advertising be "afforded the opportunity to rescind an ensuing contract and obtain a refund"); *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 334 (2011) (a "deceived party can seek rescission."); *Spann v. JCPenney Corp.*, 2015 WL 1526559 (C.D. Cal. Mar. 23, 2015) (denying summary judgment and holding that plaintiff could pursue restitution).

DEFENDANT'S CONCLUSION OF LAW NO. 4

When consumers receive some benefit from products, a full refund or disgorgement of profits would constitute an impermissible award of nonrestitutionary disgorgement.

PLAINTIFF'S RESPONSE TO CONCLUSION NO. 4

Defendant's conclusion of law is inaccurate. "Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134, 1148 (2003); *People v. Superior Ct. ("Jayhill")*, 9 Cal.3d 283, 286 (1973) (authorizing a court to issue an order that victims of false advertising be "afforded the opportunity to rescind an ensuing contract and obtain a refund"); *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 334 (2011) (a "deceived party can seek rescission."); *Spann v. JCPenney Corp.*, 2015 WL 1526559 (C.D. Cal. Mar. 23, 2015) (denying summary judgment and holding that plaintiff could pursue restitution).

DEFENDANT'S CONCLUSION OF LAW NO. 5

Benefit of the bargain damages are not recoverable under the UCL or FAL.

PLAINTIFF'S RESPONSE TO CONCLUSION NO. 5

Defendant's final conclusion of law is incorrect. Benefit of the bargain damages *are* recoverable under the UCL and FAL. *In re Anthem Inc. Data Breach Litig.*, - F Supp. 3d -, 2016 WL 589760, at *18. (N.D. Cal. Feb. 14, 2016) ("more recent case law . . . confirms that benefit of the bargain damages represent economic injury for purposes of the UCL."). *See In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1224 (N.D. Cal. 2014) (finding standing under the UCL because "[f]our of the six [p]laintiffs allege they personally spent more on Adobe products than they would had they known Adobe was not providing the reasonable security Adobe represented it was providing."); *In re LinkedIn User Privacy Litig.*, 2014 WL 1323713, *4 (N.D. Cal. Mar. 28, 2014) (finding that benefit of the bargain losses are "sufficient to confer...statutory standing under the UCL."). "Taken together, *Kwikset*, *In re Adobe*, and *In re LinkedIn* demonstrate that benefit of the bargain losses, as alleged in the consolidated amended complaint, constitute economic injury cognizable under the UCL." *In re Anthem Inc. Data Breach Litig.*, - F Supp. 3d -, 2016 WL 589760, at *18.

Dated: March 3, 2016

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